No. 20744

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

SEATTLE-FIRST NATIONAL BANK, a National Banking Association, As Trustee, *Appellant,*

vs.

THE CROWN LIFE INSURANCE COMPANY, a Corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT
United States District Judge

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The issues in this proceeding have narrowed significantly. Appellee now concedes that neither the date of delivery of the Original Policy (December 18, 1959) nor the date of the beginning of the first policy year of the Converted Policy (December 11, 1960) constitutes the "date on which this policy became effective" under the suicide clause in the Converted Policy (App. Br. 5, 25). The reason for this concession is obvious. If this Court were to adopt either of said dates as the commencement

date of the suicide clause in the Converted Policy then, under any construction of the Converted Policy, the suicide clause therein would be extended beyond the two year period permitted under R.C.W. 48.23.260(1)(b), and rendered void and unenforceable. See: Opening Brief of Appellant, pp. 50-53.

This leaves for reply Appellee's sole remaining contention that:

> ". . . the suicide clause ran from the date on which the original term policy became effective which was its issue date of December 11, 1959." (App. Br. 5)

As will be demonstrated, this contention is unsupported by admissible evidence.

There Is No Admissible Evidence In The Record Before This Court To Support A Finding Or Conclusion That The Two Year Period Of The Suicide Clause Under The Converted Policy Commenced On December 11, 1959.

A substantial portion of *Appellant's* Opening Brief was devoted to an argument, under Specification of Error No. 1, that parol testimony and documentary evidence extrinsic of the Converted Policy (Ex. 2) were inadmissible to supply or construe any term or provision of the Converted Policy's suicide clause (Appt. Br. 14-22). This argument was based on the statutory rule of integration of life insurance contracts as found in the Insurance Code of the State of Washington, and particularly R.C.W. 48.18.520, which provides as follows:

> *"Construction of Policies.*
>
> Every insurance contract shall be construed according to the entirety of its terms and con-

> ditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement or application attached to and made a part of the policy."

Significantly, Appellee did not choose to answer this argument and, consequently, it is assumed that Appellee has conceded the merit thereof. In fact, on page 23 of its Brief, Appellee notes that:

> "Since the trial court found ample evidence in the converted policy and its attachments that the parties intended the insurance to be effective from December 11, 1959, the argument on this point seems to be academic."

However, Appellee's entire argument is based upon the terms and provisions of Exhibit A-9 (App. Br. 2), which purports to be a specimen copy of the Original Policy issued by Appellee to Clark, reconstructed by Appellee from its internal business records approximately one week prior to trial (Rep. Tr. 11). Appellant's answer to this argument is simple. We are not concerned with the terms and provisions of any prior policy. We are concerned only with the terms and provisions of the Converted Policy. If Appellee had intended any of the terms and provisions of the prior Original Policy to be incorporated into the Converted Policy it could have accomplished this by attachment or endorsement. This Appellee failed to do. Consequently, Appellant submits again that the Trial Court erred in admitting in evidence Exhibit A-9 (the specimen copy of the Original Policy) and that, in determining the ultimate question on this appeal, i.e. the commencement date of the suicide clause under the Converted Policy, this Court should limit its inquiry to the four corners of the Converted Policy and wholly disregard the terms

and provisions of Exhibit A-9 (the specimen copy of the Original Policy).

Throughout Appellee's Brief (App. Br. 5-7, 11, 15-20, 24, 25, 30, 33) it is stated again and again, in one form or another, that, under the terms and provisions of the Converted Policy, it is clear that the Original Policy was dated December 11, 1959; that the "date of issue" of the Original Policy was December 11, 1959; that the first policy year of the Original Policy began on December 11, 1959; and that December 11, 1959 was the date on which the Original Policy became effective. In reply, Appellant submits that there is no term or provision in the Converted Policy which supports any one of these statements. The Converted Policy does not contain within its four corners any reference to or recitation of the date of the Original Policy, the "date of issue" of the Original Policy, the date of the beginning of the first policy year of the Original Policy or the date on which said Original Policy became effective. As these dates are not contained in the Converted Policy, they may not be utilized as the basis of a valid argument that the commencement date of the two year period of the suicide clause contained in the Converted Policy was December 11, 1959.

The sole specific reference to the Original Policy, contained in the Converted Policy, is found in paragraph 21 thereof, providing as follows:

> "21. At the written request of the Owner, copy of which is attached hereto and made a part hereof, this policy is issued in lieu of one bearing the same number issued on the 11th day of December, 1959 which is hereby cancelled." (Ex 2, Clk. R. 54).

Appellee contends that this recitation in the Converted Policy necessarily establishes the "date of issue" and "effective date" of the Original Policy. This conclusion, Appellant submits, is completely non-sequitur. *The date upon which a policy of insurance may have been executed and issued does not establish its "date of issue" for purposes of determining the commencement date of the policy's suicide or incontestable clause. Anderson vs. Mutual Life Ins. Co.,* (Cal., 1913) 130 Pac. 726; *Mutual Life Ins. Co. vs. Hurni Packing Co.,* 263 U.S. 167, 44 S. Ct. 90, 68 L. Ed. 235 (1923).

In *Anderson,* supra, the life policy in question dated May 22, 1908, was actually executed and issued on July 6, 1908. It was held that, for purposes of determining the commencement date of the policy's suicide clause which commenced upon the policy's "date of issue", said date of issue was May 22, 1908. In *Hurni,* supra, the policy, dated August 23, 1915, was in fact executed and issued on September 7, 1915. The Supreme Court of the United States, speaking through Mr. Justice Sutherland held that for purposes of determining the commencement date of the incontestable clause in the policy, the "date of issue" of the policy was August 23, 1915, stating (263 U.S. at 175):

> "Here the words, referring to the written policy, are 'from its date of issue'. While the question, it must be conceded, is not certainly free from reasonable doubt, yet, having in mind the rule first above stated, that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of actual execution of the policy, or the time of its delivery, but to

> the date of issue as specified in the policy itself."

Finally, the terms and provisions of the Converted Policy itself demonstrate the invalidity of Appellee's argument. Upon the face of the Converted Policy it appears that the policy was actually executed on March 8, 1961, yet the first annual premium date and the date of the beginning of the first policy year is stated to be December 11, 1960. This establishes, necessarily, that the date upon which a life policy was actually executed and issued is not determinative of its "date of issue" or "effective date" for purposes of determining the respective rights of the parties under the policy, particularly when, as here, the question is one of construction of a subsequent converted policy which does not contain within its terms either the date of execution, the date of the beginning of the first policy year or the effective date of the initial prior policy.

There is no term or provision within the four corners of the Converted Policy fixing the initial "effective date" of the prior Original Policy as of December 11, 1959 or, for that matter, as of any other date. Clearly, this hiatus is the fault of the Appellee insurer for, as stated by this Court in *Horwitz vs. New York Life Ins. Co.,* (9 Cir., 1935) 80 F. 2d 295, 298:

> "The ambiguity arises from the act of the draftsman in so framing the policy that, under conditions likely to arise, a question of construction also arises as to which of the four circumstances in the creation of the insurance contract fixes the 'date of issue'. We therefore hold that in resolving the doubt, if any, caused by the drafting of the policy it should be resolved in favor of the insured."

As set forth in the Opening Brief of Appellant (Appt. Br. 30-46) the incomplete nature of the Converted Policy coupled with the rule of construction adopted by this Court in *Horwitz* should necessarily lead this Court to the conclusion that, for purposes of fixing the commencement date of the suicide clause in the Converted Policy, the earliest date of reference in the insurance transaction between Clark and the Appellee, appearing within the four corners of the Converted Policy (December 1, 1959) was the "date on which this policy became effective".

Appellee's Authorities Do Not Sustain Appellee's Contention

In support of its contention that the Original Policy (and derivatively the Converted Policy) became effective on December 11, 1959, Appellee relies in its Brief upon the well-established rule of law that:

> "... the effective date or date of issue of an insurance policy insofar as it relates to a suicide clause in such policy must be that date which has been agreed to by the parties in the contract of insurance." (App. Br. 11)

This, of course, is a fundamental rule of mutual assent and, as stated by Appellee (App. Br. 11, 14) was recognized and correctly utilized by this Court in the cases of *Lloyd vs. Franklin Life Ins. Co.,* (9 Cir., 1957) 245 F. 2d 896 and *New York Life Ins. Co. vs. Noonan,* (9 Cir., 1954) 215 F. 2d 905. Similarly, the rule was correctly applied in the following additional decisions cited by Appellee: *State Mutual Life Assur. Co. vs. Stapp,* (7 Cir., 1934) 72 F. 2d 142; *Byram vs. Equitable Life Assurance Society*

of U. S., (W.D. La., 1959) 180 F. Supp. 620; *Forrest vs. Mutual Benefit Life Ins. Co.,* (1949) 86 N.Y. S. 2d 910, Aff'd, 89 N.Y. S. 2d 488; *Davis vs. Fidelity Mutual Life Ins. Co.,* (4 Cir., 1939) 107 F. 2d 150; *Franklin Life Insurance Company vs. Bieniek,* (3 Cir., 1962) 312 F. 2d 365; *Pietruszynski vs. Prudential Ins. Co. of America,* (Ill., 1964) 203 N.E. 2d 442.

In reply to this phase of Appellee's argument, Appellant submits that the rule of law noted above which was applied in each of the cited cases is inapplicable in the instant case. In the instant case the life policy before this Court for construction is a converted policy and, as conceded by Appellee:

> ". . . it is clearly established by the authorities that the date of issuance and the effective date of the new, substituted or converted policy must be the date of issue and the date the original policy became effective." (App. Br. 10)

None of the cases cited by Appellee (of which *Lloyd* and *Noonan* are typical) involved a converted policy. In each of the cases cited by Appellee the commencement date of the suicide clause could be found within the four corners of the policy before the Court as a matter of reasonable construction. For example, in *Lloyd,* supra, the suicide clause ran from the "date of issue" of the policy. In the application for the policy it was agreed that the policy should be deemed effective as of the beginning of the first policy year and the insured specifically directed the company to date the policy January 1, 1953. Thereafter, the policy dated January 1, 1953 was issued and delivered to the insured, containing a provision "First Policy Year Begins: January 1, 1953." This Court held, and correctly so, that the

policy was clear and unambiguous and that the specific written terms of the policy established January 1, 1953 as its "date of issue". Similarly, in *Noonan,* supra, the suicide clause ran from the "date of issue" of the policy. In the policy itself, said "date of issue" was specifically stated to be June 22, 1951. This Court held that, notwithstanding the fact the policy may have become effective, in accordance with its terms, on March 14, 1951, the policy's "date of issue" was clearly June 22, 1951.

In Appellant's opinion, the distinction between cases such as *Lloyd* and *Noonan* and the instant case is clear. In the instant case there is no term or provision in the Converted Policy evidencing any mutual agreement or intention on the part of the parties to fix or establish the "effective date" of the Original Policy as December 11, 1959. In the instant case there is no admissible evidence before this Court with respect to which it can be reasonably concluded that the suicide clause in the Converted Policy commenced December 11, 1959. Any such conclusion would, necessarily, be based on mere speculation. It is not the function of this Court, acting under the guise of construction, to supply a missing term or provision to a policy exclusion which would serve to defeat the insured. As stated in 1 *Corbin on Contracts* (1963) Sec. 95, at page 394:

> "A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. It is not even enough that they have actually agreed, if their expressions, when interpreted in the light of accompanying factors and

> circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract."

Appellant submits that this fundamental rule of the law of contracts is applicable in the instant case; that as the effective date of the Original Policy is missing and cannot be found within the four corners of the Converted Policy, the suicide clause in the Converted Policy is incomplete and unenforceable.

As pointed out in Appellant's Opening Brief, Appellee had the burden of establishing by a preponderance of *admissible* evidence an *enforceable* policy exclusion applicable herein to defeat Appellant's recovery (Appt. Br. 15). Appellee has failed to sustain this burden of proof. Legally, the situation is as if no suicide clause at all were contained within the Converted Policy.

The Insurance Commissioner's Authority To Waive The Required Use Of Standard Provisions Under R.C.W. 48.18.130 Does Not Extend To the Permissive Suicide Clause Which Is Specifically Governed By R.C.W. 48.23.260 (2)

There is one further facet of Appellee's Brief worthy of comment. In its Opening Brief Appellant noted that, in the Converted Policy, Appellee had departed from the standard suicide clause permitted under R.C.W. 48.23.260 (1) (b) and had attempted to limit its liability in the event of suicide

occurring within two years of the *date on which this policy became effective*, rather than within two years from *date of issue of the policy* (Appt. Br. 46-50). Appellant then argued that, as the Insurance Commissioner of the State of Washington had approved such departure (Ex. A-8), he must have determined, in accordance with R.C.W. 48.23.260(2), that the nonconforming clause was more favorable to the insured than the standard form (Appt. Br. 48-49).

Appellee's Brief does not contain any direct answer to this argument. However, Appellee does argue that the Commissioner's approval of Appellee's departure from the standard form is practical evidence of the fact that the "date of issue" and "date on which this policy became effective" are substantially similar or are one and the same (App. Br. 19-20).

Appellee's argument, Appellant submits, is based upon the erroneous assumption that, under R.C.W. 48.18.130 (1) (3) (set forth in incomplete and misleading fashion on page 8 of Appellee's Brief), the Insurance Commissioner is authorized to approve deviations from the standard suicide clause which are substantially similar to the standard clause. (App. Br. 19). This is not the case. R.C.W. 48.18.130, by its terms, is applicable only to ". . . such standard provisions as are *required* by the applicable chapters of this code pertaining to contracts of particular kinds of insurance." Under R.C.W. 48.23.020, pertaining particularly to life insurance, it is provided in pertinent part as follows:

> *"Standard provisions required—*
> *Life insurance.*
>
> (1) No policy of life insurance . . . shall be delivered or issued for delivery in this state unless it contains in substance all of the provisions required by RCW 48.23.030 to 48.23.130, inclusive."

The standard suicide clause, *permitted* under R.C.W. 48.23.260, is not one of the standard provisions *required* to be included in life insurance contracts under R.C.W. 48.23.020. Consequently, the standard suicide clase is not a *required* standard provision and is not governed by RCW 48.18.130.

As pointed out in Appellant's Opening Brief (Appt. Br. 47-48), the subject matter of limitation of liability in life insurance policies in the event of death by suicide is governed by R.C.W. 48.23.260, which provides:

> "(1) The insurer may in any life insurance policy * * * limit its liability to a determinable amount not less than the full reserve of the policy and of dividend additions thereto in event only of death occurring:
>
> (a) . . .
>
> (b) As a result of suicide of the insured, whether sane or insane, within two years from date of issue of the policy.
>
> (c) . . .
>
> (2) An insurer may specify conditions pertaining to the items of subsection (1) of this section which in the commissioner's opinion are more favorable to the policyholder."

Under this section of the Insurance Code it is clear that an insurer is *permitted* but not *required* to in-

clude a suicide clause in a life policy. The clause could be omitted entirely. However, if it is included as a limitation on the liability of the insurer, it must, as a matter of statutory mandate, conform to the standard clause specified in RCW 48.23.260 (1) (b) unless the insurer chooses to utilize a variation therefrom authorized under RCW 48.23.260(2) which, in the opinion of the Insurance Commissioner, is more favorable to the policyholder.

Appellant submits, therefore, that RCW 48.18.130 is inapplicable to the nonconforming suicide clause utilized by the Appellee insurer in the Converted Policy and that, as the Insurance Commissioner approved said nonconforming clause (Ex. A-8), he must have determined, in accordance with RCW 48.23.260 (2) that said nonconforming clause was more favorable to the policyholder than the standard form. This necessarily refutes Appellee's argument that the "date of issue" and "effective date" under the Converted Policy were substantially similar or one and the same and lends significant support to Appellant's argument that Appellee's deviation from the standard suicide clause served to shorten the same.

CONCLUSION

Appellant again respectfully submits that the Judgment of Dismissal of the District Court should be reversed with directions to enter a judgment for Appellant and against the Appellee in the sum of $288,017.52, together with interest thereon as provided by law.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY PREPARING REPLY BRIEF OF APPELLANT

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM R. SMITH

Attorney